Supreme Court, U.S.
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No. 99-1973

IN THE
SUPREME COURT OF THE UNITED STATES

Larry M. Fessler and Suzanne D. Fessler,
Petitioners,

v.

Bayshore Realty Inc., an Oregon corporation,
Cory Comstock, John C. Jensen, and David O. Quinn,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, BAYSHORE REALTY INC., CORY COMSTOCK, and JOHN C. JENSEN

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SUMMARY OF ARGUMENT

Petitioners' federal RICO claims against Bayshore Realty Inc., Cory Comstock, and John C. Jensen ("the Bayshore defendants") are barred by the claim preclusion doctrine, as the Court of Appeals held. Given that an independent state law ground exists for affirming the decision of the Court of Appeals, this Court would be unable to reach the federal law questions which petitioners present. Accordingly, the writ for *certiorari* should be denied with respect to the Bayshore defendants.

ARGUMENT

Petitioners here urge this Court to grant *certiorari* in order to provide "judicial guidance" regarding the application of Reves v. Ernst & Young, 507 U.S. 170 (1993) with respect to RICO § 1962(d) claims. In particular, petitioners assert that the Court of Appeals' interpretation of Reves with respect to the RICO elements undermines this Court's decision in Salinas v. United States, 522 U.S. 52 (1997). In addition, petitioners claim that the construction of Reves by the federal courts overall requires uniformity and clarification.

A writ of *certiorari* is inappropriate in this case because there is a dispositive, independent state law ground—claim preclusion—which would prevent this Court from even addressing the federal law issues which petitioners raise. Accordingly, this court should deny the petition for writ of *certiorari*.

Under Oregon law, as in most states, the doctrine of claim preclusion prevents a plaintiff who has prosecuted an action against a defendant to a final judgment from bringing a subsequent action against the same defendant based upon the same transaction underlying the first action. Drews v. EBI Companies, 310 Or. 134, 140, 795

P.2d 531, 535 (1990). Claim preclusion requires four elements: (1) final judgment in first action; (2) claim in second action is based on the same factual transaction at issue in the first action; (3) second action seeks a remedy in addition or alternative to the one sought in the first action; and (4) the claim in the second action is of such a nature as could have been joined in the first action. Drews, 310 Or. at 140, 795 P.2d at 535. Oregon courts employ a "broad definition" of what could have been litigated. Drews, 310 Or. at 141, 795 P.2d at 536. The principle purposes of claim preclusion are the prevention of harassment of defendants by successive legal proceedings and the economy of judicial

resources. Rennie v. Freeway Transport, 294 Or. 319, 327, 656 P.2d 919, 924 (1982).

As both the District Court and the Court of Appeals readily concluded, this action against the Bayshore defendants is barred on claim preclusion grounds. Indeed, it is undisputed that on or about September 20, 1993, petitioners filed a state court fraud action against the Bayshore defendants and Quinn in Lincoln County Circuit Court, Oregon. Petitioners alleged that defendants failed to disclose and/or actively concealed fungi and dry rot damages in connection with the Waldport, Oregon property that petitioners had purchased. After full briefing and oral argument, the state court granted

summary judgment in favor of the Bayshore defendants. Although petitioners filed a Notice of Appeal on May 5, 1995, plaintiffs on July 5, 1995 elected to dismiss their appeal against the Bayshore defendants. Petitioners thereafter proceeded to trial, then appealed the judgment in favor of Quinn. See Fessler v. Quinn, 143 Or. App. 397, 923 P.2d 1294 (1996). Finally, petitioners moved for and were denied relief from judgment on November 14, 1995.

Despite this extensive litigation in state court, petitioners thereafter on October 26, 1996 instituted this action in federal court alleging violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C.

§§ 1961-1968. The only difference between this action and the state court action was petitioners' inclusion of allegations of "conspiracy" and "scheme to defraud." These allegations, however, did not create a new "factual transaction" sufficient to render the claim preclusion doctrine inapplicable. Despite the reference to the other "victims" and the conspiracy, petitioners' focus in both the state court action and this action was the Bayshore defendants' and Quinn's alleged fraud in petitioners' purchase of the Waldport property. Under the circumstances, the District Court and the Court of Appeals properly found that this action was barred by the claim preclusion doctrine.

CONCLUSION

As the District Court and the Court of Appeals readily found, petitioners' claim against the Bayshore defendants are barred by state claim preclusion law. Notably, petitioners do not argue in their Petition for Writ of *Certiorari* that the Court of Appeals erroneously found that the claim preclusion doctrine barred this action against the Bayshore defendants. Given the independent state law ground which would preclude this Court from addressing the federal law issues relating to

RICO, this Court should deny *certiorari*. In any event, there is no compelling reason warranting this Court's review.

Dated: July 7, 2000

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29, Bayshore Realty, Inc. has no parent corporation. Nor does any publicly held company own 10% or more of its stock.

Dated: July 7, 2000

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